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No. 85-2099

In The
# Supreme Court of the United States
October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,
*Petitioner,*

v.

DOROTHY FINLEY,
*Respondent.*

## ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

## BRIEF FOR PETITIONER

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HOPE

## QUESTIONS PRESENTED

1. Is *Anders v. California*, 386 U.S. 738 (1967), applicable to collateral review proceedings?

2. Where the Pennsylvania Supreme Court previously affirmed respondent's murder conviction on a counselled direct appeal, and where newly appointed counsel found no issues on which to base a subsequent claim for collateral relief, do the sixth and fourteenth amendments require appointed counsel to file an advocate's brief or petition with the state post-conviction hearing judge?

3. Are indigent criminal defendants, who have no federal constitutional right to counsel on collateral review, entitled to compel post-conviction litigation of claims which appointed counsel deems non-meritorious?

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## BRIEF FOR PETITIONER

## OPINIONS BELOW

The Opinion and Judgment of the Pennsylvania Superior Court, which is the highest state court to render a decision on the merits of this case, is reported at 330 Pa. Super. 313, 479 A.2d 568 (1984), and set forth in the Joint Appendix at pages 18-27.[1] The unreported opinion of the

[1]Following the decision of the Superior Court, which is Pennsylvania's intermediate appellate court, petitioner timely requested discretionary state supreme court review. Petitioner's application was initially granted and the case was fully briefed and argued at the state supreme court's October 1985 Session. On April 23, 1986, however, the Pennsylvania Supreme Court dismissed the appeal as "improvidently granted." This order is reproduced in the Joint Appendix at pages 28-29. Under Pennsylvania law, the state supreme court's refusal to review is not a decision on the merits. *See Commonwealth v. Britton*, 509 Pa. 620, 506 A.2d 895 (1986); *Dayton v. Dayton*, 509 Pa. 632, 506 A.2d 901 (1986); *Commonwealth, Liquor Control Bd. v. Ronnie's Lounge, Inc.*, 485 Pa. 72, 400 A.2d 1317 (1979).

Philadelphia Court of Common Pleas, which was filed on February 23, 1983. is set forth in the Joint Appendix at pages 10-17.

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## STATEMENT OF JURISDICTION

The Pennsylvania Superior Court's Judgment was entered on June 22, 1984. On April 23, 1986, the Pennsylvania Supreme Court declined to exercise authority in the case. The petition for writ of certiorari was timely filed on June 20, 1986, and granted on October 6, 1986. The jurisdiction of this Court to review the Judgment of the Superior Court of Pennsylvania rests on 28 U.S.C.A. § 1257 (3) (1966 & Supp. 1986).[2]

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[2]The Judgment under review was entered by a three-judge panel of the Pennsylvania Superior Court. Panel judgments of the appropriate appellate court are reviewable on certiorari provided that the court was the highest court in which a decision could be had. *See Local 174, International Brotherhood of Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 98-101 (1962). *See Pennsylvania v. Henderson*, 446 U.S. 905 (1980) (writ of certiorari to Pennsylvania Superior Court). Under Pennsylvania practice, appeals are heard before the Superior Court *en banc* or by a panel "as determined by the court in its discretion." Pa.R.App.P. 3721. There is no right to reargument of a panel decision before the *en banc* court, *see* Pa.R. App.P. 3723, nor is a request for *en banc* reargument a prerequisite to discretionary review in the state supreme court. *See* Pa.R.App.P. 1113. Since the state supreme court ultimately declined to review this case, the Superior Court panel is the highest state court in which a decision on the federal questions could be had. *See American Ry. Express Co. v. Levee*, 263 U.S. 19 (1923); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 n.1 (1968).



## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Six, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the assistance of counsel for his defense.

United States Constitution, Amendment Fourteen, which provides:

> . . . No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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## STATEMENT OF THE CASE

Respondent, a Philadelphia drug dealer known to narcotics officers as "Black Dot," was convicted of second-degree murder and related offenses for the April 15, 1975 shooting of a competing drug dealer. The victim, Melvin Clark, who was shot inside his Philadelphia residence, died as a result of gunshot wounds to the shoulder and head. Two anonymous sources subsequently informed police that Clark, who sold drugs from his Silver Street home, was the victim of an on-going drug war with respondent, the biggest narcotics dealer in the Eleventh Street area. After these tips were corroborated by police records and statements were obtained from co-defendant Garfield Hedgman, police obtained a search warrant for respondent's apartment (N.T. Suppression Hearing, 14-20, 24-28, 65-74,

79-86; Prattis, J., Findings of Fact and Conclusions of Law Sur Defendant's Motion to Suppress Physical Evidence). Ballistics evidence confirmed that a bullet removed from the victim's body was fired from the .22 caliber Colt revolver found in respondent's bedroom closet (N.T. 10/14/75, 68-69, 80-81; N.T. 10/16/75, 3-16).

Represented by court-appointed counsel, David Zwanetz, Esquire, respondent successfully litigated a pre-trial motion to suppress statements which she gave police the night of her arrest. The companion motion to suppress the murder weapon, however, was denied (Prattis, J., Findings of Fact and Conclusions of Law). Respondent's case was listed for trial before a judge unfamiliar with the suppressed evidence. After a full on-the-record colloquy, respondent voluntarily waived her right to a jury trial and elected to be tried by the Honorable Armand Della Porta, sitting as trier-of-fact (N.T. 10/14/75, 3-37).[3]

Between October 14 and October 17, 1975, respondent was tried before Judge Della Porta. The principal prosecution witness, Garfield Hedgman, testified that he was at the decedent's home to purchase drugs when the murder occurred. Also present were respondent and another individual whom Hedgman identified as "Red Dude." According to Hedgman, respondent had agreed to loan him a "nickel" (five dollars) so that he could buy narcotics from Clark. Hedgman needed the money because Clark

[3]Initially, the case was listed for a jury trial before the late Honorable Samuel Smith, who earlier presided at the jury trial of respondent's son, Tyrone. When respondent decided to waive a jury, Judge Smith recused himself (N.T. 10/14/75, 3). Her case, therefore, was relisted before Judge Della Porta.



had raised his price and refused to "stand it short." Before the transaction could be completed, "Red Dude" drew a gun and fired at Clark.

The victim's screaming wife begged the intruders not to hurt her or her baby. Respondent answered for the conspirators and assured the woman that no one would hurt her or the child. Taking the victim's wife with them, respondent and Hedgman then went upstairs to search for drugs. Upon completing the search the parties left. While leaving, Red Dude fired two more shots into the victim's head. Respondent and the shooter fled in respondent's car, which was driven by her son Tyrone.[4] Before driving away, they handed Hedgman a quantity of drugs and told him to "split" (N.T. 10/15/75, 6-20, 23-24).

Respondent's defense was that she spent the afternoon of Clark's murder at her physician's office, at the pharmacy getting her prescription, and at the supermarket buying fruits and vegetables. Neither her doctor, nor her pharmacist, however, could pinpoint the exact time of her visits (N.T. 10/15/75, 73, 76-77, 81, 86-87). Moreover, since the supermarket was only two blocks from the victim's home, respondent's own testimony placed her in the neighborhood of the crime scene near the time of the murder (N.T. 10/15/75, 169-170).

Respondent's attempts to explain the murder weapon's location were equally unconvincing. One of her witnesses,

[4]Tyrone Finley was separately tried and convicted of third degree murder. Because his inculpatory statement was suppressed and the admissible evidence established only his "mere presence" outside the murder scene, his conviction was reversed on direct appeal. *See Commonwealth v. Finley*, 477 Pa. 382, 383 A.2d 1259 (1978). The prosecution's case against respondent, of course, was much different.

Ronald Brown, testified that Garfield Hedgman gave him a bag which he (Brown) purportedly put in respondent's closet without her knowledge (N.T. 10/15/75, 109-110). Brown, a close friend of respondent's daughter, claimed that this bag contained the weapon. His testimony, however, was inconsistent with his previous statements to police and directly contradicted the testimony of the police officer who executed the search warrant (N.T. 10/16/75, 5). Not one of the three guns found in respondent's closet was in a bag; in fact, the package described by Brown was never located.

The trial judge, resolving credibility issues adversely to respondent, convicted her of second-degree murder, robbery, criminal conspiracy and weapons offenses. Following the denial of the extensive post-verdict motions filed by her appointed counsel, respondent was sentenced to life imprisonment for the murder and to lesser concurrent prison terms for robbery, conspiracy, and possessing an instrument of crime.

Still represented by her appointed trial attorney, respondent appealed to the state supreme court.[5] That court rejected the arguments raised in counsel's full brief on the merits and unanimously affirmed. *See Commonwealth v. Finley*, 477 Pa. 211, 383 A.2d 898 (1978).

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[5]The state supreme court then had direct appellate jurisdiction in all felonious homicide cases. See 42 Pa.Cons.Stat.Ann. § 722(1) (Purdon 1981). Since November 22, 1980, however, felonious homicide appeals, with the exception of death cases, lie in the Pennsylvania Superior Court. *See Commonwealth v. Jones*, 501 Pa. 162, 460 A.2d 739 (1983); *Commonwealth v. DeBose*, 501 Pa. 399, 461 A.2d 797 (1983).



Respondent next sought state court collateral review in the Philadelphia Court of Common Pleas. Her *pro se* Post Conviction Hearing Act petition raised precisely the same issues which were previously rejected by the state supreme court on direct appeal. Because these issues had been finally litigated under former Pa.Stat.Ann. tit. 19, § 1180-4 (Purdon 1966) (repealed 1982), substantially reenacted as 42 Pa.Cons.Stat.Ann. § 9544 (Purdon 1982), the Common Pleas Court summarily denied her petition without a hearing and without the appointment of counsel.

Respondent, through new appointed counsel, Paul Gordon Hughes, Esquire, again appealed to the state supreme court. This appeal did not identify any substantive claims of error, but alleged only entitlement to P.C.H.A. counsel. The state supreme court remanded the case to the Court of Common Pleas with instructions to determine whether respondent was indigent and, if so, to appoint counsel for proceedings under the Post Conviction Hearing Act. *See Commonwealth v. Finley*, 497 Pa. 332, 440 A.2d 1183 (1981) (J.A. 6-8).

On remand, the lower court appointed new post-conviction counsel, Michael A. Seidman, Esquire, who reviewed the notes of testimony and consulted with his client. Based on his advocate's review of the record, Mr. Seidman concluded that there was no even arguable basis for collateral relief. He so advised the court by letter and requested permission to withdraw from the case. His letter discussed the two finally litigated claims which respondent had raised in her *pro se* petition and wished to pursue, and stated that respondent had identified no additional claims which she wanted counsel to raise (J.A. 9).

Upon receipt of counsel's letter, the post-conviction court judge, the Honorable Edward J. Blake, conducted his own independent review of the case and similarly concluded that the record was devoid of arguably meritorious issues. Judge Blake specifically refused to compel counsel to "find" an issue when counsel, exercising his best professional judgment, had responsibly determined that there was no basis for relief (J.A. 13-14). In rejecting any suggestion that counsel's acceptance of a court appointment thereby required him to pursue, or invent, frivolous collateral claims, Judge Blake reasoned that such a requirement ill serves indigent defendants, debases the legal profession, and undermines the integrity of the criminal justice system (J.A. 16). He, therefore, permitted Mr. Seidman to withdraw, and dismissed respondent's petition.

Represented by Catherine M. Harper, Esquire, fourth court-appointed and current counsel, respondent appealed the petition's dismissal to the Pennsylvania Superior Court. On June 22, 1984, a panel of that court remanded the case for further post-conviction proceedings because prior post-conviction counsel did not comply with the formal requirements of *Anders v. California*, 386 U.S. 738 (1967). The state supreme court subsequently declined to exercise its discretionary authority in the case. A timely petition for writ of certiorari was thereafter filed with this Court and granted on October 6, 1986.

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## SUMMARY OF ARGUMENT

*Anders v. California*, 386 U.S. 738 (1967), adopted strict briefing and notice requirements so as to protect the then recently recognized constitutional right of indigent criminal defendants to meaningful first appeals where such appeals are provided by a state. These procedures need not, and ought not, be extended to collateral review proceedings.

There is no federal constitutional right to counsel on collateral review. The mere voluntary provision of such assistance, for reasons of policy and efficiency, does not justify *Anders* application in this forum. Were this to occur, *Anders*—which was intended merely to protect an underlying constitutional right—would improperly raise to constitutional dimension any state-created grant of counsel on collateral review.

States must be free to experiment and to adopt procedures which best promote the fair and proper administration of justice without being required to shoulder additional illogical and unnecessary burdens. *Anders* procedures have proved cumbersome and difficult to apply. In part, *Anders* practical effect has been to invert equal protection. Under its mandate, indigent defendants with frivolous issues achieve more considered appellate review than their wealthier counterparts whose retained attorneys raise substantive but meritless claims.

Indigent defendants need not, in the name of equal protection, be provided with all that wealthy defendants are capable of purchasing. Fundamental fairness requires only that indigents be able adequately to present their

claims within the adversary system and that they have meaningful access to the courts.

Application of *Anders* on collateral review is not required to vindicate defendants' rights to due process or equal protection. This Court has recognized that the protection of indigent defendants may, in some circumstances, be appropriately limited and that lines may be drawn. A proper limit and line was here recognized and drawn by the post-conviction court judge. He appropriately declined to apply *Anders* and instead accepted a well-considered "no-merit" letter. This Court must reinstate that decision and find *Anders* inapplicable on collateral review.

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## ARGUMENT

### The Procedures Mandated By This Court In Anders v. California, 386 U.S. 738 (1967), Ought Not To Extend To Collateral Review Proceedings.

Twenty years ago this Court substantially limited the ability of a court-appointed counsel to withdraw from a first direct appeal which he deemed frivolous. *See Anders v. California,* 386 U.S. 738 (1967). The Court's strict briefing and notice requirements provided, *inter alia,* that counsel, based on his assessment of the appeal's frivolity, must accompany his motion to withdraw with "a brief referring to anything in the record that might arguably support the appeal." *Id.,* 386 U.S. at 744. These procedures were intended to protect the indigent criminal



defendants' then recently recognized right to counsel in first state court direct appeals where state procedures provided such appeals as of right. *See Douglas v. California,* 372 U.S. 353 (1963).

This case presents the question left open by *Anders:* the applicability of its procedures to collateral review proceedings. Respondent, Dorothy Finley, had the benefit of a counselled state court direct appeal. Following its denial she sought state court collateral review, asserting only previously decided and, thus, finally litigated, claims under Pennsylvania law. Pa.Stat.Ann. tit. 19, § 1180-4 (Purdon 1966) (repealed 1982), substantially reenacted as 42 Pa.Cons.Stat.Ann. § 9544 (Purdon 1982). Counsel was nevertheless appointed under state court procedural rules, Pa.R.Crim.P. 1503 and 1504 (Appendix A), which, for reasons of policy and efficiency, have guaranteed indigent defendants the right to counsel for first post-conviction petitions and all subsequent petitions raising new issues. *See Commonwealth v. Finley,* 497 Pa. 332, 440 A.2d 1183 (1981) (J.A. 6-8); *Commonwealth v. McClinton,* 488 Pa. 598, 413 A.2d 386 (1980); *Commonwealth v. Mitchell,* 427 Pa. 395, 235 A.2d 148 (1967).

Appointed counsel, after meeting with his client and reviewing the record, concluded that there were no arguably meritorious issues to be raised on her behalf. He sought, therefore, to withdraw pursuant to a "no-merit" letter (J.A. 9). Following procedures intended to scrupulously protect respondent's rights (J.A. 13-14), the collateral review court allowed withdrawal. The Pennsylvania Superior Court reversed, however, believing that it

was constitutionally required to do so (J.A. 22-24).[6] This Court must hold otherwise. *Anders* extension to collateral review is impractical, unwise, and constitutionally unnecessary.[7]

*Anders* may warrant clarification, but certainly does not warrant expansion. *Anders* practice is already so confused, and counsel's *Anders* dilemma to acute, that any *Anders* extension will seriously deter the proper administration of justice.[8] Many courts have found the with-

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[6]The decision below relies exclusively on this Court's interpretation of the federal constitution in *Anders*, and on state cases which, in turn, are based on federal precedent. *See Commonwealth v. Lohr*, 503 Pa. 130, 468 A.2d 1375 (1983); *Commonwealth v. McClendon*, 495 Pa. 467, 434 A.2d 1185 (1981); *Commonwealth v. Baker*, 429 Pa. 209, 239 A.2d 201 (1968). Even where state grounds are intermixed in a lower court's holding, the state court's reliance on federal grounds warrants review by this Court. *See Oregon v. Kennedy*, 456 U.S. 667-671 (1982).

[7]Pennsylvania's misguided perception of constitutional necessity has permitted *Anders* to assume a life of its own. The Pennsylvania Superior Court has since further extended *Anders* to probation revocation appeals, and has directed the Commonwealth to file "a *responsive* brief to counsel's *Anders* brief." *Commonwealth v. Thomas*, 511 A.2d 200 (Pa. Super. Ct. 1986) (emphasis in original). Requiring the prosecutor to brief the so-called merits of an admittedly frivolous defense appeal, is both unreasonable and illogical. Far more practical is the District of Columbia rule; there, counsel who files an *Anders* brief and asks to withdraw is instructed to file his brief and motion with the clerk of court, but is specifically precluded from serving the government. *Suggs v. United States*, 391 F.2d 971 (D.C. App. 1968).

[8]According to one career defender, *Anders* improperly encourages frivolous appeals, undermines the integrity of the *in informa pauperis* bar, and delays appellate review of meritorious claims. *See* Doherty, *Wolf! Wolf!—The Ramifications of Frivolous Appeals*, 59 J. Crim. L. Criminology & Police Sci. 1 (1968).

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drawal procedures and shizophrenic briefing requirements of *Anders* impossible to apply. These courts perceive little logic to a procedure requiring an advocate's brief

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While an increased number of non-meritorious appeals may be the necessary price for our universal system of direct review where every indigent defendant is entitled under *Douglas* to one free appeal, there must be some limits on a convicted defendant's right to pursue non-meritorious litigation. Such a limit is properly imposed on collateral review. Courts in Arizona and Illinois have concluded that *Anders* does not apply on state court collateral review. *See People v. McCarty*, 17 Ill. App. 3d 796, 308 N.E.2d 655 (1974); *State v. Thompson*, 139 Ariz. 552, 679 P.2d 575 (1984). *See also State v. Shattuck*, 140 Ariz. 582, 684 P.2d 154 (1984) (*Anders* applies to first direct appeal only; "system is strained to the point that we cannot afford the luxury of repeated review of trivia or issues of small merit"). *Contra, Robbins v. State*, 288 Ark. 311, 705 S.W.2d 6 (1986) (where the Arkansas Supreme Court mechanically applied *Anders* on collateral review); *Ex parte Sawyer*, 543 S.W.2d 143 (Tex. Crim. App. 1976) (mechanical application of *Anders* to habeas actions challenging extradition and to bail appeals); *White v. State*, 380 N.W.2d 1 (Iowa Ct. App. 1985) (collateral proceeding; withdrawal based on frivolity governed by Iowa Appellate Rule 104 which follows *Anders*).

In *United States ex rel. Curtis v. Illinois*, 521 F.2d 717, 720 (7th Cir.), *cert. denied*, 423 U.S. 1023 (1975), the court held *Anders* applicable only to direct appeals and not to post-conviction hearings. The three-judge panel included Justice Clark, *Anders'* author, sitting by designation following his retirement from this Court. *But see Dinkins v. Alabama*, 526 F.2d 1268, 1269 (5th Cir.), *cert. denied*, 429 U.S. 842 (1976); *United States ex rel. Banks v. Henderson*, 514 F.2d 1000, 1001 (2d Cir. 1975), in which the courts, essentially without discussion, applied *Anders* to permit federal habeas counsel to withdraw. There is, of course, little opportunity for federal courts to consider *Anders* on habeas since counsel is not appointed until the case has been pre-screened to determine if any non-frivolous issues have been raised. 28 U.S.C.A. § 1915(d) (1966). While the federal courts have decided to use a pre-screening procedure, the states must be free to use any procedure which meets constitutional requirements. As will be shown, the attorney's no-merit letter here tendered is a constitutionally acceptable alternative.

on anything "arguable" when counsel has already concluded that the appeal is wholly frivolous.[9] At least five states have concluded that *Anders* is so unworkable that they simply refuse to entertain any petitions to withdraw based on frivolity. Thus, in Colorado, Idaho, Indiana, Massachusetts and Missouri, counsel must brief every case on the merits, regardless of counsel's assessment of its merits.[10]

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[9]*See e.g. State v. McKenney,* 98 Idaho 551, 568 P.2d 1213 (1977) (Idaho will not folow impractical and illogical procedure of *Anders*); *State v. Banks,* 541 P.2d 808 (Utah 1975) ("we doubt the soundness and propriety of insisting that a defendant is entitled to what counsel in good faith believes to be an entirely meritless appeal"). A number of states sought to clarify *Anders* by attempting to distinguish between issues that were "arguable," but not meritorious, and those that were outright frivolous. While some issues are plainly more frivolous (*i.e.* less meritorious) than others, *see Commonwealth v. Shea,* 398 Mass. 264, 496 N.E.2d 631 (1986), efforts to develop a meaningful definition of what constitutes a frivolous appeal have provided little guidance. *See Commonwealth v. Moffett,* 383 Mass. 201, 418 N.E.2d 585 (1981) ("Although we have defined a frivolous appeal as one that 'not merely [lacks] merit, but would not have a prayer of a chance' . . . we agree with those courts and commentators who have rejected or downplayed any distinction between frivolous and meritless appeals for purposes of assessing appointed counsel's obligation under *Anders.*"). *See also* Hermann, *Frivolous Criminal Appeals,* 47 N.Y.U.L. Rev. 701 (1972). Perhaps the only workable definition was suggested by the California Superior Court. *See People v. Johnson,* 123 Cal. App. 3d 106, 176 Cal. Rptr. 390 (1981), *cert. denied,* 457 U.S. 1108 (1982), which defines an arguable issue as one that has a reasonable potential for success and which, if successful, will result in either a reversal or modification of judgment.

[10]COLORADO: *McClendon v. People,* 174 Colo. 7, 481 P.2d 715 (1971) (counsel should brief appeal as best he can and forego oral argument); IDAHO: *State v. McKenney,* 98 Idaho 551, 568 P.2d 1213 (1977) (if appeal is frivolous, less of the court's and counsel's time will be expended in directly con-

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Federal *Anders* practice also has been less than consistent and has, on occasion, been strained. Some courts have noted that no-merit letters are insufficient under *Anders, see United States v. Johnson,* 527 F.2d 1328-1329 (5th Cir. 1976); *United States v. McCoy,* 518 F.2d 1293 (4th Cir. 1975); others seem to suggest no alternative when stating that counsel need not brief frivolous issues,

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sidering the merits; no instance where counsel has been permitted to withdraw on frivolity); INDIANA: *Dixon v. State,* 152 Ind. App. 430, 284 N.E.2d 102 (1972) (no withdrawal from frivolous collateral appeal). Insofar as *Dixon* required appointed counsel to raise every frivolous issue that defendant wanted to raise, it was overruled by the Indiana Supreme Court in *Music v. State,* 489 N.E.2d 949 (Ind. 1986). *See also Smith v. State,* 173 Ind. App. 443, 363 N.E.2d 1295 (1977) (although court conducts *Anders*-type review on direct appeal, counsel should have complied with full briefing requirement of *Dixon);* MASSACHUSETTS: *Commonwealth v. Moffett,* 383 Mass. 201, 418 N.E.2d 585 (criticizes *Anders* procedure as cumbersome, impractical, and "Janus-faced"; even if an appeal is frivolous, court will expend less time and energy in direct review on the merits; counsel may not withdraw on grounds of frivolousness but may "dissociate" himself by so stating in preface in which case *Anders* notice requirements are enforced). Under Massachusetts practice, counsel can offer a disclaimer as to individual issues that he deems frivolous, but which his client wants to pursue. *Commonwealth v. Shea,* 398 Mass. 264, 496 N.E.2d 631 (1986). MISSOURI: *State v. Gates,* 466 S.W.2d 681 (Mo. 1971) (court will deny motions to withdraw on grounds of frivolousness; preferrable for counsel to remain in a weak or groundless appeal even at some cost to the concept of professional independence of the lawyer; counsel's appearance is not an implicit representation that he believes in the legal substantiality of claims advanced); *State v. Pinkus,* 550 S.W.2d 829 (Mo. Ct. App. 1977) (counsel commendably discharged his duty to raise all points that could be presented even where some of the thirteen issues raised were extremely strained and tenuous). *Compare People v. Green,* 61 A.D.2d 962, 403 N.Y.2d 247 (1978) (some appeals are so frivolous that the attorney has a duty not to make the argument even though it is more expedient than filing an *Anders* brief and motion to withdraw).

*see Alvord v. Wainwright,* 725 F.2d 1282 (11th Cir.), *cert. denied,* 459 U.S. 956 (1984); *United States v. Cain,* 544 F.2d 1113 (1st Cir. 1976). Courts occasionally have accepted *Anders* briefs without indicating in their opinions that the briefs included anything other than a statement that the appeal was frivolous. *See United States v. Buigues,* 568 F.2d 269 (2d Cir. 1978); *United States v. Barrow,* 540 F.2d 204 (4th Cir. 1976).

Given *Anders'* impossible requirements, the most logical position is that of *Nickols v. Gagnon,* 454 F.2d 467 (7th Cir. 1971) (Stevens, J.), *cert. denied,* 408 U.S. 925 (1972). Instead of emphasizing the word "brief" in *Anders,* the court there noted that an attorney need only refer to issues and not argue them. *Id.* at 468-469, 470-471, 472. While this view of an *Anders* brief seems to conflict with the *Anders* admonition not to act as an *amicus,* other courts have indicated that an attorney can submit a brief which presents or analyzes an issue and the relevant authority without arguing the merit of the issue. *See, e.g., Government of Virgin Islands v. James,* 621 F.2d 588 (3d Cir. 1980).

The Seventh Circuit has characterized *Anders* as requiring "a brief that will advise the court of what points he might have raised and why he thinks they would have been frivolous." *United States v. Edwards,* 777 F.2d 364, 366 (7th Cir. 1985). "This will assist the court in evaluating the defendant's pro se appeal, and will thus put the indigent defendant in about as good a position as that of the affluent defendant who can get a lawyer to make frivolous arguments on his behalf." *Id.* The First Circuit has referred to *Anders* to point out that frivolous claims take



time away from meritorious claims. *See United States v. Cain,* 544 F.2d 1113 (1st Cir. 1976).

Nor are these the only difficulties and disagreements caused by *Anders* in the federal courts. Although *Anders* was concerned with court-appointed appellate counsel, the Second Circuit has accepted an *Anders* brief from retained counsel. *See Grimes v. United States,* 607 F.2d 6 (2d Cir. 1979). Another problem not specifically considered by *Anders* is whether new counsel should be appointed if the motion to withdraw is denied. Defendants might well object to continued representation by attorneys precluded from withdrawing based on frivolity; few courts, however, have discussed this problem. The Second Circuit gave no indication that it appointed new counsel after denying *Anders* motions to withdraw. *See United States v. Stroman,* 667 F.2d 416 (2d Cir. 1981); *United States v. Evans,* 665 F.2d 54 (2d Cir. 1981).

*Anders* also did not specifically decide if an attorney must meet with the defendant before filing an *Anders* brief. Two circuits have found that such a meeting is highly desirable but not constitutionally required. *See United States ex rel. Russo v. Attorney General of Illinois,* 780 F.2d 712, 715 (7th Cir.), *cert. denied,* 106 S.Ct. 2922 (1986); *Smith v. Cox,* 435 F.2d 453, 458-459 (4th Cir. 1970), *vacated on other grounds sub nom., Slayton v. Smith,* 404 U.S. 53 (1971).[11]

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[11]Pennsylvania's difficulties in administering *Anders* have been different, but no less severe. Indeed, its *Anders* practice has been described as "especially opaque." Hermann, 47 N.Y.U.L. Rev. 701, 708 n.39.

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*Anders* has also been severely criticized on the ground that it compels more vigorous appellate review of a case that counsel deems frivolous, *see* 386 U.S. at 745, than a

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*Commonwealth* v. *Baker*, 429 Pa. 209, 239 A.2d 201 (1968), which adopted *Anders*, held that counsel seeking to withdraw from a frivolous appeal must file a separate petition to withdraw accompanied by a brief referring to anything in the record that might arguably support the appeal. Although *Baker* admonished counsel not to be an *amicus curiae*, the *Baker* court did not explain what counsel had to do to satisfy the *Anders* briefing requirement. Subsequent Pennsylvania cases unreasonably chastised defense counsel when, "in a conscientious effort to be honest with the court," counsel recited the facts and pertinent law, but then proceeded to demonstrate why the appeal was meritless. *See Commonwealth* v. *Perry*, 464 Pa. 272, 275, 346 A.2d 554 (1975); *Commonwealth* v. *Collier*, 489 Pa. 26, 413 A.2d 680 (1980). *See also Commonwealth* v. *Greer*, 455 Pa. 106, 314 A.2d 513 (1974) (requirement that counsel not act as *amicus curiae* strictly enforced; lack of merit not legal equivalent of frivolity). The cases inconsistently demanded that counsel file both a petition to withdraw finding the appeal wholly frivolous, and a supporting advocate's brief wherein counsel was precluded from explaining why the appeal was lacking in merit. *See Commonwealth* v. *Greer; Commonwealth* v. *Perry; Commonwealth* v. *Collier*. Because this interpretation of *Anders* made counsel's right to withdaw almost illusory, the Pennsylvania Supreme Court established a more flexible and enlightened approach to the briefing requirement and held that counsel could discharge his responsibility if he showed that he had reviewed the record as an advocate. *Commonwealth* v. *McClendon*, 495 Pa. 467, 434 A.2d 1185 (1981). It rejected the view that counsel's mere expression of why an appeal was without basis automatically made his brief an unacceptable *amicus curiae* brief. *See Nickols* v. *Gagnon*, 454 F.2d 467. *McClendon*, however, has not always been followed by Pennsylvania's intermediate appellate court, which views it as inconsistent with *Anders*. *See Commonwealth* v. *Thomas*, 511 A.2d at 202. Hence, the opacity of Pennsylvania *Anders* practice continues unabated.



case where counsel has filed the traditional advocate's brief.[12] To this extent, *Anders* represents a complete inversion of the equal protection doctrine, whereby the indigent defendant with only frivolous issues can achieve more considered appellate review than his wealthier counterpart whose retained counsel raises a substantive, albeit nonmeritorious, claim.[13] *See People* v. *Wende*, 25 Cal. 3d 436, 158 Cal. Rptr. 839 (1979); *State* v. *Clayton*, 639 P.2d 168 (Utah 1981) (unlike ordinary appeals, Utah courts will not affirm under *Anders* unless the appellate tribunal is unanimous in its decision).

The foregoing underscores the need for encouraging states to protect any "right" to counsel on collateral review by an alternative means and conclusively establishes the impracticality of *Anders'* routine and thoughtless extension. Even more importantly, this extension was constitutionally unnecessary; it misconstrued the scope of the right to counsel which *Anders* protects and elevated to con-

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[12]*See, e.g., People* v. *Von Staich*, 101 Cal. App. 3d 172, 161 Cal. Rptr. 448 (1980) (*Anders* review involves "unconscionable amount of time which could be better spent on more productive judicial pursuits"); *State* v. *Horine*, 64 Or. App. 532, 669 P.2d 797, *review denied*, 296 Or. 237, 675 P.2d 490 (1983), *cert. dismissed*, 466 U.S. 934 (1984) (Oregon Court of Appeals extremely critical of *Anders* anomaly and almost universal interpretation of that case, whereby "an appellate court must search record for error when counsel has found none, but need not do so when counsel finds and argues one claim of error").

[13]The most extreme examples of this problem are found in the California cases where a number of non-*Anders* litigants have cited the equal protection clause in support of their claim for *Anders* review. *In re Edward S.*, 133 Cal. App. 3d 154, 183 Cal. Rptr. 733 (1982); *People* v. *Logan*, 131 Cal. App. 3d 575, 182 Cal. Rptr. 543 (1982); *People* v. *Johnson*, 123 Cal. App. 3d 106, 176 Cal. Rptr. 390 (1981), *cert. denied*, 457 U.S. 1108 (1982).

stitutional status a right without a federal constitutional basis.

Despite the state court's apparent contrary belief, *Anders* conferred no new right on the criminally accused. Rather, it articulated specific procedures for enforcing the newly recognized right to counsel on a first direct appeal as of right.[14] This right to counsel recognized by *Douglas* depended on both a due process and an equal protection

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[14]There is no constitutional right to appeal a criminal conviction. *See Abney v. United States,* 431 U.S. 651 (1977); *McKane v. Durston,* 153 U.S. 684, 687-688 (1894). Congress provided for direct review of capital cases by this Court in 1889. This right was extended to other infamous crimes in 1891. *See Evitts v. Lucey,* 469 U.S. 387 (1985) (Rehnquist, J., now C.J., dissenting), citing *Carroll v. United States,* 354 U.S. 394, 400 n.9 (1957). The general right to appeal criminal convictions did not arise until 1911; in 1928, Congress eliminated discretionary review by writ of error and permitted the appeal of all federal convictions. *See* 3 Wayne R. LaFave & J. H. Israel, Criminal Procedure, § 261, p.172 n.5 (1984 & Supp. 1986).

Likewise, virtually all states permit direct appeals, as of right, from criminal convictions. Virginia and West Virginia, the exceptions, have devised closely equivalent procedures. In deciding whether to hear an appeal, the Virginia appellate court requires a three-judge panel to consider the record, briefs, and oral argument by the appellant. In West Virginia, a defendant is entitled to a petition for review and to present his petition at a ten-minute oral argument. *See* Dalton, *Taking the Right to Appeal (More or Less) Seriously,* 95 Yale L.J. 62 n.2 (1985). In addition, all fifty (50) states provide for collateral review. For a description of the post-conviction remedies available in the states, *see* Donald E. Wilkes, Jr., Federal and State Postconviction Remedies and Relief, at 231-260 (1983 & Supp. 1985) (Appendix A: a survey of current post-conviction remedies and relief in each of the fifty states and the District of Columbia); Larry W. Yackle, Postconviction Remedies, at 66-69 (1981 & Supp. 1986) (survey of jurisdictions). *Anders* extension to collateral proceedings would further burden those jurisdictions that choose to provide indigent defendants with counsel on collateral review.



analysis.[15] The Court noted, however, that "[a]bsolute equality is not required; lines can be and are drawn and we often sustain them." *Id.,* 372 U.S. at 357. This case is a case in which such a line must be drawn.

Because *Anders* depends on the underlying constitutionally-based *Douglas* right to counsel on a first appeal, its burdensome protections can be constitutionally required at subsequent proceedings only where there also exists a federal constitutional right to counsel. Collateral review is not such a proceeding.

This Court has explicitly stated that there is no right to counsel in pursuing state or federal discretionary appeals. *See Ross v. Moffitt,* 417 U.S. at 609; *Wainwright v. Torna,* 455 U.S. 586 (1982). There are not sufficient differences between discretionary and collateral review to warrant finding a right to counsel on collateral review. *See Bounds v. Smith,* 430 U.S. 817, 839, 840-841 (1977) (Rehnquist, J., now C.J., dissenting) (given the Court's holding in *Ross v. Moffitt* that there is no right to counsel on discretionary appeal, "[i]t would seem, *a fortiori,* to follow from that case that an incarcerated prisoner who has pursued all his avenues of direct review would have no constitutional right whatever to state appointed

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[15]" 'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." *Ross v. Moffitt,* 417 U.S. 600, 609 (1974).

Applying these concepts, the *Douglas* Court found that forcing an indigent to have his "one and only appeal" decided without counsel draws an "unconstitutional line" between rich and poor. Running a "gantlet of a preliminary showing of merit" did not, in the Court's opinion, "comport with fair procedure." *Id.,* 372 U.S. at 357.

counsel to represent him in a collateral attack on his conviction, and none of our cases has ever suggested that a prisoner would have such a right"). Indeed, there is no right to counsel for federal habeas corpus actions.[16] Nor is there a constitutional basis for requiring any more in state court than is required in federal court. *See Norris v. Wainwright,* 588 F.2d at 134. Thus, the lower federal courts have recognized that there is no constitutional right to counsel in state post-conviction or collateral proceedings.[17]

Even in the absence of a federal constitutional right, individual states may, of course, choose to grant a right to counsel on state collateral review. *See Ross v. Moffitt, supra.* Whether this is by way of a supervisory rule of court, as in Pennsylvania, Pa.R.Crim.P. 1503 and 1504, or as a matter of state constitutional law, *Anders* formal requirements should not apply. State-created rights are

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[16]*See Johnson v. Avery,* 393 U.S. 483, 488 (1969) ("It has not been held that there is any general obligation of the courts, state or federal, to appoint counsel for prisoners who indicate, without more, that they wish to seek post-conviction relief."); *see also Harrington v. Holshouser,* 741 F.2d 66, 70 (4th Cir. 1984) (requirements of prison library); *Cepulonis v. Fair,* 732 F.2d 1, 6 (1st Cir. 1984); *Young v. Zant,* 727 F.2d 1489, 1493 (11th Cir. 1984), *cert. denied,* 105 S.Ct. 1371 (1985); *Norris v. Wainwright,* 588 F.2d 133 (5th Cir.), *cert. denied,* 444 U.S. 846 (1979); *Hopkins v. Anderson,* 507 F.2d 530, 533 (10th Cir. 1974), *cert. denied,* 421 U.S. 920 (1975); *Kreiling v. Field,* 431 F.2d 638, 640 (9th Cir. 1970).

[17]*See Dankert v. Wharton,* 733 F.2d 1537, 1538 (11th Cir.), *cert. denied,* 469 U.S. 1020 (1984); *Norris v. Wainwright,* 588 F.2d at 132. *See also Boyd v. Dutton,* 405 U.S. 1, 7 n.2 (1972) (Powell, J., dissenting) (no absolute right to counsel in state post-conviction proceedings); Yackel, Postconviction Remedies, § 137, p.519 ("There is, then, no blanket constitutional right to the assistance of counsel in collateral proceedings.").



best vindicated by the states themselves. The states should be free to experiment, and to decide what procedures can most meaningfully and fairly enforce state laws, without illogically and unnecessarily burdening them further.[18]

A contrary conclusion would allow *Anders* to be used to transform, from a non-constitutional to a federal constitutional basis, any provision for counsel on collateral review. That this Court's decisions do not require such a result is evidenced by *Bounds v. Smith,* which held that the provision and availability of law libraries was constitutionally adequate to insure incarcerated prisoners with meaningful access to the courts on collateral review.[19] Respondent here, of course, received even more; she received an attorney who, after scrupulously reviewing the record and discussing the case with her, found no arguably meritorious issue(s) to raise on her behalf. Although respondent had received more than she was entitled to,

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[18]*See People v. Von Staich,* 101 Cal. App. 3d 172, 161 Cal. Rptr. 448 (1980) ("After the State Public Defender has said there are no arguable issues, our subsequent review in this case might be compared to touching up a Rembrandt, proofreading Shakespeare or editing a speech by Winston Churchill."). Indeed, as the three dissenters in *Anders* noted, the *Anders* procedures were premised on unwarranted distrust for the *in forma pauperis* bar. *See* 386 U.S. at 746-747 (Stewart, J., dissenting, joined by Black and Harlan, JJ.). While these procedures may be required for purposes of direct appeal, where there is a right to counsel protected by the federal constitution, there is absolutely no basis or need to extend *Anders* protections to collateral review proceedings.

[19]The Court specifically noted that while some states do provide prisoners with professional assistance in pursuing collateral claims, "adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts." *Bounds v. Smith,* 430 U.S. at 830.

*see, Bounds v. Smith,* the Pennsylvania Superior Court nevertheless illogically superimposed on those protections the additional protections of *Anders.*

A review of *Douglas,* upon which *Anders* depended, as well as the cases following, demonstrates the Superior Court's illogic. *Douglas* relied on both an equal protection and a due process analysis. Its equal protection analysis derived from *Griffin v. Illinois,* 351 U.S. 12 (1956) (indigent defendant must be provided with a free transcript). This analysis has been de-emphasized in recent cases, *see Bearden v. Georgia,* 461 U.S. 660, 664-667 and n.8 in particular (1983), which have made it clear that indigent defendants need not, in the name of equal protection, be provided with everything that a wealthy defendant is capable of purchasing. *See Ross v. Moffitt; Nickols v. Gagnon,* 454 F.2d at 472 (Stevens, J.) ("Every defendant does not have the constitutional right to be represented by Clarence Darrow. Perfect equality between indigents and non-indigents, or among members of the class of non-indigents itself, is impossible to achieve.") *cert. denied,* 408 U.S. 925 (1972); *Slawek v. United States,* 413 F.2d 957, 960 (8th Cir. 1969) (Blackmun, J.) (fact that rich defendants may waste money on unnecessary and foolish trial steps does not give the indigent the right to squander government funds).[20]

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[20]Lawyers, of course, whether retained or court-appointed, have the identical ethical obligation not to pursue frivolous appeals. *See Polk County v. Dodson,* 454 U.S. 312, 323 (1981) ("Although a defense attorney has a duty to advance all colorable claims and defenses, the canons of professional ethics impose limits on permissible advocacy. It is the obligation of any lawyer—whether privately retained or publicly appointed—not to clog the courts with frivolous motions or appeals (footnote omitted)."); Standards for Criminal Justice, Standard 4-3.9 &

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Hence, this Court's resultant critical inquiry has been whether indigent defendants have lacked meaningful access to the courts, and, therefore, been deprived of due process. "[W]hile the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy . . . it has often reaffirmed that fundamental fairness entitles indigent defendants 'to an adequate opportunity to present their claims fairly within the adversary system.' " *Ake v. Oklahoma,* 470 U.S. 68 (1985), citing *Ross v. Moffitt,* 417 U.S. at 612. The equal protection analysis thus collapses into the due process analysis. *See Bearden v. Georgia,* 461 U.S. at 665-666.[21]

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commentary (1980). Every lawyer also has the same duty to counsel his client regarding the issues and probability of success on appeal. *See* Standards for Criminal Justice, Standard 21-2.2 (1980).

A non-indigent defendant whose retained counsel has advised him that an appeal will almost certainly be denied has a financial incentive to save his money and abandon the appeal. Since the indigent, however, has nothing to lose, he is far less inclined to forego any "right" conferred upon him by the state. This is reverse equal protection; it risks widespread deleterious effects. "With nothing to lose, impecunious defendants may be exercising the right to appeal imprudently and without much forethought . . . In the opinion of some careful students of appellate justice, this nothing-to-lose position of indigent defendants could cause an erosion of appellate process that would result in less adequate justice for all appellants, especially those who have substantial questions to raise for determination by appellate courts (footnote omitted)." Standard 21-2.3 and commentary. While this result may be required to protect defendant's *Douglas* rights, there is no reason to give frivolous collateral proceedings the same constitutionally-protected status.

[21]"To determine whether this differential treatment violates the Equal Protection Clause, one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This

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Meaningful access and fundamental fairness are due process concepts. Protection must be equal only to the extent necessary to insure the meaningful access required by due process.[22]

Respondent cannot seriously contend that she has been denied "meaningful access" to the courts in seeking collateral review of her murder conviction. Since filing her *pro se* Post Conviction Hearing Act petition, respondent has been given three (3) free attorneys, and her case has twice been before the state appellate courts. To superimpose *Anders* protections upon this litany of "rights" would demean the legal profession.[23] Moreover, it would sanction a constitutionally unnecessary litigious merry-go-round.

While this "Court has long been sensitive to the treatment of indigents in our criminal justice system," the Court

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is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the state to revoke probation when an indigent is unable to pay the fine." *Id.*

[22]*See, e.g., Burns v. Ohio,* 360 U.S. 252 (1959) (an indigent defendant may not be required to pay filing fees); *Mayer v. City of Chicago,* 404 U.S. 189 (1971) (an indigent defendant must be provided with a free transcript although he must make out a colorable showing of need if he wishes to receive a complete verbatim transcript); *Karabin v. Petsock,* 758 F.2d 966, 969 (3d Cir.), *cert. denied,* 106 S.Ct. 163 (1985) (same); *Byrd v. Wainwright,* 722 F.2d 716 (11th Cir.), *cert. denied,* 469 U.S. 869 (1984) (a transcript must be provided even for a discretionary appeal).

[23]This Court has recognized that there are contexts in which it is appropriate to defer to the judgment of appointed counsel. *See Jones v. Barnes,* 463 U.S. 745, 754 (1983) (appointed appellate counsel is not constitutionally required to press every nonfrivolous point requested by the client; advocate's role, as recognized by *Anders,* is to support the client "to the best of his ability"). The situation here presented likewise warrants deference to appointed counsel's judgment.



has nevertheless "recognized limits on the principle of protecting indigents in the criminal justice system." *Bearden v. Georgia,* 461 U.S. 660, 664 (1983). That limit was here properly recognized by the post-conviction hearing court judge who declined rotely to apply *Anders* and instead accepted defense counsel's well-considered "no-merit" letter. This Court must reinstate that decision and hold *Anders* inapplicable to collateral review proceedings.

## CONCLUSION

For the foregoing reasons, it is respectfully requested that the order of the Pennsylvania Superior Court be reversed and the case remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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## APPENDIX A

Pa.R.Crim.P. 1503 and 1504, Relating to Post-Conviction Proceedings, and Accompanying Notes

RULE 1503. APPOINTMENT OF COUNSEL.

(a) Except as provided in Rule 1504, when an unrepresented petitioner satisfies the court that he is unable to procure counsel, the court shall appoint counsel to represent him. The court, on its own motion, shall appoint counsel to represent a petitioner whenever the interests of justice require it.

(b) Where counsel has been appointed, such appointment shall be effective until final judgment, including any proceedings upon appeal from a denial of collateral relief.

*NOTE: Adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; recission vacated June 4, 1982.

RULE 1504. SUMMARY DISPOSITIONS.

Appointment of counsel shall not be necessary and petitions may be disposed of summarily when a previous petition involving the same issue or issues has been finally determined adversely to the petitioner and he either was afforded the opportunity to have counsel appointed or was represented by counsel in proceedings thereon.

*NOTE: Adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; recission vacated June 4, 1982.